

## **COMMUNITY AFFAIRS**

### **Division Of Codes And Standards**

#### **Uniform Construction Code; Construction Boards of Appeals**

**Construction permits; Standard forms; Duties of construction official;**

**Hourly charges for development-wide inspection of homes; Hearing procedures**

**Proposed Amendments: N.J.A.C. 5:23-1.6, 2.14, 2.16, 4.5, 4.17, 4.18, 4.20, and N.J.A.C. 5:23A-2.2**

**Proposed New Rule: N.J.A.C. 5:23-2.35**

Authorized by: Susan Bass Levin, Commissioner, Department of Community Affairs

Authority: N.J.S.A. 52:27D-124 and -198; 40:55D-53.2a

Proposal Number: PRN 2006-

Calendar: See Summary below for explanation of exception to calendar requirement.

Submit written comments by: June 30, 2006 to:

Michael L. Ticktin, Esq.  
Chief, Legislative Analysis  
Department of Community Affairs  
PO Box 802  
Trenton, NJ 08625-0802  
Fax Number: (609) 633-6729  
E-mail: mticktin@dca.state.nj.us

---

**SUSAN BASS LEVIN**  
**Commissioner**

The agency proposal follows:

#### **Summary**

These proposed amendments and new rule arise out of the Supreme Court decision in the case *DKM Residential Properties Corporation v. the Township of Montgomery and the Construction Board of Appeals of the Township of Montgomery* and Governor's Executive Order 33. The *DKM* decision, referenced above, reverses an Appellate Division decision and holds that construction officials can and should issue Notices of Violation for any code violation found after issuance of the certificate of occupancy and transfer of title. Governor's Executive Order 33 orders that certain administrative actions be taken to strengthen consumer protections for new home purchasers.

The proposed amendments and new rule seek to provide a framework for local code enforcement agencies to address problems reported by homeowners after issuance of a Certificate of Occupancy has been issued. Consistent with the Supreme Court's decision, the proposed amendments and new rule affirm the obligation of the construction official to issue Notices of Violation for violations found after issuance of

the Certificate of Occupancy. (N.J.A.C. 5:23-2.35 and 4.5(h)) And the proposed amendments and new rule reiterate the fact that, pursuant to the statute of repose (N.J.S.A. 2A:14-1.1), the developer cannot be cited more than ten years after issuance of the Certificate of Occupancy. The proposed rules also clarify which Code would be applicable to the building through an amendment to N.J.A.C. 5:23-1.6.

In order to protect the rights of both the homeowner and the builder, all Notices and Orders issued by the construction official are served upon both the homeowner and the builder. And both have standing to appeal any determination made by the construction official in such cases. The proposed amendments include a requirement for a permit for any work resulting from a Notice of Violation issued to the builder after the issuance of the Certificate of Occupancy. This will enable the construction official to ensure that any proposed corrective work meets the requirements of the Code. (N.J.A.C. 5:23-2.14) The proposed amendments also add new standard forms to the list of standard forms contained at N.J.A.C. 5:23-4.5(b). These new standards forms were developed by the Department expressly for use in cases where a Notice of Violation is issued after issuance of a Certificate of Occupancy. These forms include a Notice of Violation and Order to Terminate (Form F213) that provides a space for the construction official to list any items included in a homeowner complaint that do not constitute violations of the Uniform Construction Code. In this way, the right of the homeowner to appeal the determination of the construction official that certain items are not violations is preserved. The Department also developed a new form that must be submitted with the permit application, Form F101 Consent to Undertake Proposed Work. The use of this new form, together with the requirement for a permit in every case, will ensure that the homeowner has consented to the corrective work to be undertaken by the builder.

The Department has also determined that certain violations of the Uniform Construction Code are sufficiently serious in nature that, if such violations are discovered in one house after issuance of the Certificate of Occupancy, the local code enforcement agency should take steps to ensure that all other homes in the development that might have similar violations are identified and the violations, if found, are corrected. The proposed new rule at N.J.A.C. 5:23-2.35(a)1 (moved from N.J.A.C. 5:23-4.5(h)3) establishes this requirement and adds a section on structural deficiencies that would warrant development-wide action.

The proposed amendments also enable municipalities to hire licensed engineers or architects to assist with enforcement when it is necessary to take development-wide action after issuance of Certificates of Occupancy, pursuant to new section N.J.A.C. 5:23-2.35(a)2. The proposal provides for the municipality to charge the developer on an hourly basis to cover the cost of this effort. This will enable the municipality to hire outside help where the time demands of the post-certificate of occupancy inspections required might have overwhelmed the local code enforcement office and to recoup the cost of this additional work. This proposal makes reference to the provisions of the Municipal Land Use Law applicable to engineering review fees for development applications to ensure that such charges are reasonable and properly accounted for. The proposal mirrors or references the Municipal Land Use Law for establishing and maintaining an escrow for this purpose, making charges to the escrow and accounting for the escrow charges. These proposed requirements are found at

N.J.A.C. 5:23-2.35, 4.17 and -4.18. The proposed amendments to N.J.A.C. 5:23-4.20 revise the Department's fee schedule to enable the Department to charge the developer on an hourly basis for such inspections when it is the enforcing agency. The proposed new rule at N.J.A.C. 5:23- 2.35 also addresses the qualifications of any engineering or architectural firm hired for this purpose and stipulate that this work is subject to the supervision and control of the construction official. Finally, at N.J.A.C. 5:23-2.16, the proposal would require that the escrows required under these proposed rules be paid prior to issuance of any new permits to the developer.

The proposal also establishes requirements for construction officials to report serious problems with a developer to the Department. Because both licensed code officials and builders are subject to regulation by the Department, it is important for the Department to know of any serious problems that may exist. In the case of licensed code officials, a related amendment to require that the construction official report any disciplinary action taken against UCC-licensed staff for failure to properly enforce the UCC if the action includes the suspension or dismissal of the employee in question was adopted at 37 NJR 4907(a). In the case of developers, this proposal would require that the construction official report instances where it is necessary to invoke the provisions of new N.J.A.C. 5:23-2.35(a)1. and take development-wide action because of the serious nature of the violations discovered, as well as instances where the municipal engineer tells the construction official that the municipality has had to call the bond because the developer failed to complete site improvements satisfactorily and instances where the developer fails to maintain funds in the escrow account described above. The Department will use these reports to track serious problems and to take whatever enforcement action may be appropriate. These proposed reporting requirements are contained at N.J.A.C. 5:23-4.5(h).

Finally, because any disputes are to be transferred to the Construction Board of Appeals for resolution, as discussed above, the proposed amendments establish that the filing of an appeal constitutes consent to entry by the members of the Board of Appeals and that all parties must be notified of any planned visit by any member(s) of the Board of Appeals. (N.J.A.C. 5:23A-2.2)

As the Department has provided a 60-day comment period on this notice of proposal, this notice is exempted from the rulemaking calendar requirement, pursuant to N.J.A.C. 1:30-3.3(a)5.

### **Social Impact**

As described above, the Department anticipates that the proposed amendments would have a positive social impact in that they establish an orderly and fair process for the handling of problems discovered in residential construction after issuance of a Certificate of Occupancy. The proposed amendments also provide for the development-wide correction of any serious code violations discovered.

### **Economic Impact**

The proposed rule will have an economic impact on any builder of a development where serious code violations are discovered in at least one house in that the proposal provides for the cost of inspection of the remaining homes in the development to be paid by the builder. It is the Department's position that the municipality should not have to bear the cost of such inspections. Under the provisions of the Uniform Construction

Code Act, code enforcement activities are to be fee supported. The proposed amendments also provide a mechanism for the builder to appeal these charges.

#### **Federal Standards Statement**

No Federal standards analysis is required because these amendments are not being proposed in order to implement, comply with, or participate in any program established under Federal law or under a State law that incorporates or refers to Federal law, standards, or requirements.

#### **Jobs Impact**

The Department does not anticipate that any jobs will be created or lost as a result of these proposed amendments.

#### **Agriculture Industry Impact**

The Department does not anticipate that the proposed amendments would have an impact on the agricultural industry.

#### **Regulatory Flexibility Statement**

The proposed amendments might impose additional fees on "small businesses," as defined by the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. in that many builders meet this definition. However, as stated above, it is the Department's position that this is fair, necessary, and in keeping with the provisions of the Uniform Construction Code Act. The proposed amendments would not impose any new reporting, recordkeeping or compliance requirements upon "small businesses."

#### **Smart Growth Impact**

The Department does not expect that it would have any impact upon either achievement of "smart growth" or implementation of the State Plan.

**Full text** of the proposal follows (additions indicated in boldface thus; deletions indicated in brackets [thus]):

### **5:23-1.6 Grace period**

(a) For a period of six months following the operative date of a subcode revision, applicants may submit a complete permit application, including all prior approvals, to be reviewed under the code in force immediately preceding the subcode revision. Provided that the application is complete, the construction official and applicable subcode officials shall perform the plan review and issue the construction permit(s) based on the code in force immediately prior to the operative date of the subcode revision. This grace period shall apply only to revisions of the subcodes.

**1. For purposes of this chapter, "the Code in effect at the time of permit application" shall mean either the Code in effect on the date of submission of a complete permit application or the Code under which the original plans were reviewed and released pursuant to this section.**

### **5:23-2.14 Construction permits--when required**

(a) It shall be unlawful to construct, enlarge, repair, renovate, alter, reconstruct or demolish a structure, or change the use of a building or structure, or portion thereof, or to install or alter any equipment for which provision is made or the installation of which is regulated by this chapter, or to undertake a project involving lead abatement in

accordance with N.J.A.C. 5:17, without first filing an application with the construction official, or the appropriate subcode official where the construction involves only one subcode, in writing and obtaining the required permit therefor.

1. [Exception: No permit shall be required for ordinary maintenance as defined in N.J.A.C. 5:23-1.4 and 2.7.] **Notwithstanding any provision of (b) below to the contrary, a permit shall be required for any work to abate violations cited in a Notice of Violation and Order to Terminate (F213) issued after a certificate of occupancy has been issued.**

(b) – (f) (No change.)

#### **5:23-2.16 Construction permits--procedures**

(a) - (i) (No change.)

(j) Conditions of permit: The issuance of the construction permit shall be conditioned upon the following:

1. - 4. (No change.)

**5. That all escrows required to be paid by the applicant, pursuant to N.J.A.C. 5:23-4.17(d), in connection with work done under permits issued for development-wide violation correction, pursuant to N.J.A.C. 5:23-4.5(h)4, have been paid unless there is an appeal pending. For purposes of applying this provision, any escrow due from any person or entity affiliated with the applicant by way of having any common officers, directors, or shareholders with at least a ten percent interest, shall be deemed to be due from the applicant.**

(k) (No change.)

#### **5:23-2.35 Enforcement actions in residential developments after issuance of certificate(s) of occupancy**

**(a) Subsequent to the issuance of a certificate of occupancy, the construction official shall issue a notice of violation for any violation of the provisions of the Code in effect at the time of permit application that comes to his or her attention. Pursuant to N.J.S.A. 2A:14-1.1, no notice of violation may be issued to the developer or to any contractor more than ten years after issuance of the certificate of occupancy.**

**1. If violations of any of the following provisions of the Code in effect at the time of permit application are found in a residential structure in a development, other than Group R-1, subsequent to the issuance of a certificate of occupancy, the construction official shall ensure that all units within the development that might have similar violations are inspected for such violations and that any such violations found are cited and abated.**

**i. N.J.A.C. 5:23-2.32 Unsafe structures;**

**ii. The following provisions of the building subcode:**

**(1) Chapter 4, Special Detailed Requirements Based on Use and Occupancy, except for sections 401, 402.3, 403.12, 406.1, 406.2, 406.3.1, 406.3.2, 406.3.3, 406.3.4, 406.3.5, 406.3.6, 406.3.7, 406.4, 406.5, 409, 412;**

**(2) Chapter 7, Fire-resistant Rated Construction;**

**(3) Section 803, Wall and Ceiling Finishes;**

**(4) Chapter 9, Fire Protection Systems; and**

(5) Chapter 10, Means of Egress, except for sections 1003.3.3.3.1, 1003.3.3.3.2, 1003.3.3.11, 1003.3.12, 1008.9, 1009.11 and 1008.12;

iii. The following provisions of the one - and two-family dwelling subcode:

(1) Sections R-302.1, R-302.2 and R-302.3, Required Fire Resistance Ratings;

(2) Section R-317, Smoke Alarms; and

(3) Sections R-321.1 and R-321.2, Dwelling Unit Fire

Separations;

iv. The following provisions of the electrical subcode:

(1) Section 240.3, Protection of Equipment Against

Overcurrent;

(2) Section 240.4, Protection of Conductors Against

Overcurrent;

(3) Section 250.4, General Requirements for Grounding and

Bonding; and

v. Subchapter 7, the barrier free subcode.

vi. Any structural deficiency which is present or likely to occur that has the potential for injury or significant damage to the livability of a home. This shall include any structural member that exceeds the permitted deflection established at N.J.A.C. 5:23-6.5(c)1.i.

2. The municipality may retain the services of a professional engineer or registered architect, to be paid at an hourly rate and to work subject to the supervision and control of the construction official, for inspections, review of plans and supporting documents and preparation of reports and documents, in connection with enforcement of (a) 1. above provided that the professional retained is independent of both the builder and the homeowner and has no actual or apparent conflict of interest that would call into question his or her ability to carry out these duties impartially. Any person carrying out inspections under such a contract shall be, at a minimum, a licensed engineer or a registered architect or shall have a bachelor's degree from an accredited institution of higher education in engineering or in architecture, or in engineering or architectural technology and shall have not less than five years of experience in the design, construction or rehabilitation of woodframe structures.

#### **5:23-4.5 Municipal enforcing agencies--administration and enforcement**

(a) (No change.)

(b) Forms:

1. (No change.)

2. The following standardized forms established by the Commissioner are required for use by the municipal enforcing agency:

Form No. Name

**F101 Consent to Undertake Proposed Work**

**F213 Notice of Violation and Order to Terminate (Post Certificate of Occupancy – Residential Construction)**

**F214 Notice and Order of Penalty (Post Certificate of Occupancy – Residential Construction)**  
.....

3. – 5. (No change.)

(c) – (g) (No change.)

(h) Duties of construction officials:

1. The construction official shall enforce the regulations and:

i. - xix. (No change.)

xx. Comply with any local procedures which may be established by the governing body to provide the municipal search officer with information concerning construction permits and certificates of occupancy; [and]

xxi. File with the Department a notice of the execution of each contract with a private on-site inspection agency, which notice shall specify the subcode(s) covered by the contract, within 10 days after the effective date of the contract[.];

**xxii. Issue a notice of violation pursuant to N.J.A.C. 5:23-2.35 for any violation of the provisions of the Code in effect at the time of permit application that comes to his or her attention. Pursuant to N.J.S.A. 2A:14-1.1, no notice of violation may be issued to the developer or to any contractor more than ten years after issuance of the certificate of occupancy.**

**xxiii. Ensure that all units within a residential development, other than Group R-1, that might have similar violations are inspected for such violations and that any such violations found are cited and abated if violations of the provisions of the Code in effect at the time of permit application listed at N.J.A.C. 5:23-2.35(a)1. are found in a residential structure in the development subsequent to the issuance of a certificate of occupancy. The construction official shall supervise the work of any professional engineer or registered architect hired by the municipality for this purpose.**

**xxiv. Report the name of the developer and the nature of the code violation(s) to the Department by sending this information in writing to the Office of Regulatory Affairs, 101 S. Broad Street, PO Box 818, Trenton, NJ 08625 whenever:**

**(1) it is necessary to take development-wide action for code violations discovered after issuance of certificate(s) of occupancy pursuant to N.J.A.C. 5:23-2.35(a)1.;**

**(2) the municipal engineer advises the construction official that the municipality has had to call a bond posted pursuant to N.J.S.A. 40:55D-53 due to failure of the developer to complete site improvements satisfactorily; or**

**(3) the developer fails to maintain funds in the escrow account required pursuant to N.J.A.C. 5:23-4.17 unless the charges to the escrow account are under appeal.**

2. (No change.)

[3. Subsequent to the issuance of a certificate of occupancy, the construction official shall continue to enforce compliance with the following provisions of the Code in effect at the time of the issuance of the certificate of occupancy or certificate of approval:

i. N.J.A.C. 5:23-2.32 Unsafe structures;

ii. The following provisions of the building subcode:

- (1) Chapter 4, Special Detailed Requirements Based on Use and Occupancy, except for sections 401, 402.3, 403.12, 406.1, 406.2, 406.3.1, 406.3.2, 406.3.3, 406.3.4, 406.3.5, 406.3.6, 406.3.7, 406.4, 406.5, 409, 412;
- (2) Chapter 7, Fire-resistant Rated Construction;
- (3) Section 803, Wall and Ceiling Finishes;
- (4) Chapter 9, Fire Protection Systems; and
- (5) Chapter 10, Means of Egress, except for sections 1003.3.3.3.1, 1003.3.3.3.2, 1003.3.3.11, 1003.3.12, 1008.9, 1009.11 and 1008.12;
- iii. The following provisions of the one- and two-family dwelling subcode:
  - (1) Sections R-302.1, R-302.2 and R-302.3, Required Fire Resistance Ratings;
  - (2) Section R-317, Smoke Alarms; and
  - (3) Sections R-321.1 and R-321.2, Dwelling Unit Fire Separations;
- iv. The following provisions of the electrical subcode:
  - (1) Section 240.3, Protection of Equipment Against Overcurrent;
  - (2) Section 240.4, Protection of Conductors Against Overcurrent;
  - (3) Section 250.4, General Requirements for Grounding and Bonding; and
- v. Subchapter 7, the barrier free subcode.]
- (i) – (j) (No change.)

#### **4.17 Municipal enforcing agency fees**

- (a) - (c) (No change.)
- (d) The fee for development-wide inspection of homes after issuance of a certificate of occupancy ordered pursuant to N.J.A.C 5:23-2.35 shall be an amount equal to twice the hourly base salary paid to any licensed code official performing the work or the hourly fees charged to the municipality by a professional contracted to provide such services pursuant to N.J.A.C. 5:23-2.35, subject to the accounting procedures and limits set forth below.**
  - 1. Such charges or fees shall be only those that are reasonable and necessary in order to ascertain whether a violation exists or to verify that any work performed has abated the violation.**
  - 2. The municipality shall place in escrow all monies paid by the developer for this purpose. The escrow shall be held in any account maintained by the municipality in the same manner as that established for the deposit of escrow funds paid for professional review services, inspection fees and performance and maintenance guarantees as provided for at N.J.S.A 40:55D-53.1.**
  - 3. The developer shall post an initial deposit in the amount of \$200.00 per home or an amount determined by the municipality to be necessary to cover the estimated cost of two months' inspection activity, whichever is greater. At monthly intervals, the developer shall increase the amount in the escrow fund so that it shall be sufficient to pay the cost of the next two months' inspection activity or the cost of completing the inspections, whichever is less.**



**4. Standards for hourly charges for development-wide inspection of homes after issuance of a certification of occupancy shall be as follows:**

**i. Hourly charges shall be limited only to municipal or consulting professional charges for inspections, review of plans and supporting documents and preparation of reports and documents and shall accurately reflect the hours engaged in these activities.**

**ii. The only costs that shall be added to any such charges shall be actual out-of-pocket expenses of any consulting professional engineer or registered architect hired for this purpose including normal and typical expenses incurred in performing inspections and reviewing plans and supporting documents for the required corrective work.**

**iii. The developer shall not be billed and no charge shall be made to any escrow account or deposit for any municipal clerical or administrative functions, overhead expenses, meeting room charges, or any other municipal costs and expenses except as provided for in this subsection, nor shall a municipal enforcing agency professional add any such charges to his expenses.**

**iv. Where licensed municipal code officials perform these inspections, the fee shall be 200% of the hourly base salary of the inspector(s) multiplied by the number of hours spent on inspections and review of plans and supporting documents for any necessary corrective work.**

**5. Payments shall be charged to the escrow, and shall be made by the Chief Financial Officer of the municipality, and a final accounting shall be provided, in accordance with the procedure set forth in paragraphs c. and d. of N.J.S.A. 40:55D-53.2. Payments shall be made from any such escrow by the Chief Financial Officer only upon approval by the Construction Official.**

**6. Appeals of any charges levied by the municipality pursuant to this subsection shall be made to the construction board of appeals, in accordance with the procedures set forth in N.J.S.A. 40:55D-53.2a and N.J.A.C. 5:23A.**

Redesignate (d) as (e) (No change in text.)

#### **4.18 Standards for municipal fees**

(a) - (b) (No change.)

(c) Basic construction fee: The basic construction fee shall be computed on the basis of the volume of the building or, in the case of alterations, the estimated construction cost, and the number and types of plumbing, electrical and fire protection fixtures and devices as herein provided.

1. Fees for new construction or alterations shall be as follows:

i. - vii. (No change.)

**viii. A different unit rate may be established for permits for work done in response to Notices of Violation issued pursuant to N.J.A.C. 5:23-2.35.**

(d) - (h) No change.)

(i) Rules concerning the appeal of fees are:

1. - 2. (No change.)

**3. Any appeal of hourly charges imposed pursuant to (l) below shall be made in accordance with N.J.S.A. 40:55D-53.2a and N.J.A.C. 5:23A.**

(j) - (k) (No change.)

**(l) Fees for development-wide inspection of homes after issuance of a certificate of occupancy shall be in accordance with N.J.A.C. 5:23-4.17(d).**

#### **5:23-4.20 Department fees**

(a)-(d) (No change.)

**(e) Hourly charges and fees for development-wide inspection of homes after issuance of a certificate of occupancy shall be in such amount as may be reasonable and necessary in order to ascertain whether a violation exists or to verify that any work performed has abated the violation.**

**1. The hourly charge shall be the same as the hourly charge set forth at N.J.A.C. 5:23-4.20(b)4. times the number of hours spent by the code official in determining whether a violation exists or verifying that any work performed has abated the violations.**

**2. Any appeal of a charge levied by the Department pursuant to this subsection shall be made in accordance with N.J.A.C. 5:23-2.38.**

#### **5:23A-2.2 Hearing procedures**

(a)-(d) (No change.)

(e) At the beginning of each hearing, the chairperson, or the person presiding in his or her absence, shall state for the record the statute under which the appeal is being brought, the nature and date of the action appealed from, the date the appeal was filed and the basis of the appeal. Thereafter, the matter shall proceed with the representative of the municipality or the professional hired by the municipality or municipal agency, as the case may be, explaining the basis for the action, ruling, order, notice or fee, as the case may be. The appellant, or his or her representative, shall then present the basis for his or her disagreement.

1. (No change.)

2. [A board member shall not visit a site for any reason having to do with a matter before the board without prior notice to other members of the board and to the parties. No such visit shall be made in the company of one party unless a representative of the other party is present.] **By having filed an appeal, a party shall be deemed to have consented to the entry upon the site of members and staff of the board.** Any member who has visited a site subsequent to the filing of the appeal shall disclose that fact on the record prior to a party's presentation and shall be subject to questions from either party or any board member pertaining to the visit. **A board member shall not, during the course of any such visit, engage in any discussion of issues involved in the case, and shall give a full account of any conversations that do take place in the course of any such visit as part of the disclosure of having visited the site.**

3. (No change.)

(f) (No change.)